IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

SUIT NO. 1558 OF 1978.

Municipal Corporation of Gr. Bombay .. Plaintiff.
V/s.
Gala Warehousing & ors. .. Defendants.

Mr. Ravi Shirsekar for the Plaintiff.
None for the Defendants.

CORAM : V.C.DAGA, J.

DATED : 7.2.2006

JUDGMENT:

. The plaiting has filed this suit against the defendants, claiming damages against them, jointly and severally, in the sum of Rs. 10,54,138.50 p. with interest thereon.

Facts:

2. The plaintiff- Bombay Municipal Corporation (the plaintiff) is a statutory corporation constituted under the Bombay Municipal Corporation Act, 1888 ('the Act') and discharges its public duties to construct, maintain public bridges. One of such bridges popularly known as "Mahalaxmi Bridge" at Dhobiwada, Jacob Circle, Bombay, was constructed by the Corporation in the discharge of its duties enumerated in the Act.

3. The 1st defendant is a firm of which defendant Nos. 2,3 and 4 (since deceased) were partners; whereas defendant Nos. 6 and 7 are partners of 5th defendant. Defendant No.8 is a proprietary concern of one Mr. C.M. Patel.

4. According to the plaintiffs, the defendants had stored inflammable articles/chemicals and hazardous goods in the premises located below the bridge without permission and/or licence from the Corporation. Somewhere in the early hours of 6th July, 1974, fire broke out in the premises in the course of which number of explosions took place which even fire brigade could not control. It, ultimately, damaged the property of the plaintiff-corporation viz. "Mahalaxmi bridge" making it impossible to repair. As a result of the fire, the bridge was completely damaged. The plaintiff- Corporation estimated its loss at Rs. 10,54,138.50 p. in suit. Plaintiff thus claimed that they are entitled to recover the said sum of Rs. 10,54,138.50p. by way of damages jointly and severally from the defendants.

5. The Particulars of the plaintiffs claims described in the plaint are as under:

1. Actual expenditure as per Book Value. ..Rs.10,18,427.81
2. Departmental works ..Rs 5,000.00
3. BEST C. Bill ..Rs. 5,000.00 ----------

..Rs. 10,28,427.81

Add 2 1/2% supervision charges..Rs. 25,710.60.

Rs. 10,54,138.00

6. The defendant Nos. 1 and 2 filed their

written statement. Defendant Nos. 1 and 2 denied and disowned their liability to compensate the Corporation. The other defendants did not file written statement, with the result, they were proceeded exparte.

Issues:

7. The issues relevant to the pleadings which read as under were framed:

. 1. Whether the plaintiffs prove that the Mahalaxmi Bridge at Dhobiwada, Jacob Circle, Bombay,has vested in the plaintiff as alleged in paragraph 1 of the plaint - No-

. 2. Whether the plaintiffs prove that the application made by the first Defendant in June, 1973 for a license was rejected by the plaintiff as alleged in paragraph 5 of the plaint? -No.-

. 3. Whether the plaintiff had served upon the first defendant & notice u/sec 394(4) of the M.M.C. Act as alleged in paragraph 5 of the plaint? -No-

. 4. Whether the plaintiffs prove that the fire which occurred in the first premises on 6th July 1974 was due to the inflammable and hazardous material, stroked therein by the defendants Nos. 1 & 2 as alleged in para 7 of the plaint? -No-

. 5. Whether the plaintiffs prove that the goods mentioned in Exhibit E to the plaint stored in the suit premises on 6th July, 1974 could not have been stored in the suit premises without a valid licence and in conformity with the subject to the condition imposed thereunder or totally prohibited as alleged in paragraph 7 of the plaint? -No-

. 6. Whether the plaintiffs prove that the Defendants are jointly and severally liable to pay damages to the plaintiffs for storage of inflammable

materials in the suit premises as alleged in paragraph 8 and 12 of the plaint? -No-

. 7. Whether the plaintiffs prove that the Defendant Nos. 1 & 2 committed a breach of duty or were negligent to prevent out break or spread of fire and did not adopt any remedial measures to p;event out break of fire as to ensure its expeditious extinguishment as alleged in paragraph 9 of the plaint? -No- .

. 8. Whether the plaintiffs prove that the defendant Nos. 1 & 2 has failed to remove the residence from the suit premises as alleged in paragraph 10 of the plant? -No-

. 9. Whether the plaintiffs prove that the Mahalaxmi Bridge was damaged as a result of the fire and the cost of reconstruction of the damaged portion amounted to Rs. 10,54,138,50 paise as alleged in paragraph 13 of the plaint? -No-

. 10. Whether the defendant Nos. 1 &2 prove that the fire was caused by continuous and incessant rain and heavy flooding and on account of a short circuit of the electric cable of United Tin Works, adjacent premises as alleged in paragraph 6 of the written statement? -No-

. 11. Whether the Defendant Nos. 1 & 2 prove that the licence was required to be obtained by the fifth defendant as alleged in paragraph 7 of the written statement? -No-

. 12. Whether the Defendants Nos. 1 & 2 prove that all safety measures were existing in the suit premises as alleged in paragraph 9 of the written statement? -No-

. 13. Whether the Defendant Nos. 1 & 2 prove that the fire was caused on account of negligence on the part of the plaintiffs and/or B.E.S.T. Undertaking as alleged in paragraph 9 of the written statement? -No-

8. The parties were directed to complete discovery and inspection before 10th June 2002. The suit was placed on board for recording evidence on 10th June, 2002. Parties to the suit were directed to file there affidavit of evidence along with

relevant documents in support of the case. Accordingly, affidavit of evidence along with compilation of documents were filed by the plaintiff. In the meanwhile, defendant No.4 expired. However, no steps were taken to substitute the name of defendant No.4, with the result, suit came to be dismissed as abated against defendant No.4

9. After having received examination-in-chief through affidavit under O.18 R. 4 of the Code of Civil Procedure, one Shri Milind Thakkar, Advocate, was appointed as Court Commissioner to record evidence by way of cross-examination of P.W.1. The parties were directed to appear before the Commissioner appointed by the Court.

10. The Commissioner submitted his report dated 18.1.2006. It is reported by him that on 16.6.2005 he had held preliminary meeting of the parties for fixing schedule of recording cross-examination. He further reported that he was informed by Shri P.V. Palan that he would be withdrawing his appearance from the suit. Accordingly, he was directed to take appropriate steps in that behalf. In the meanwhile, two dates i.e. 11..7.2005 and 12.7.2005 were fixed for the purpose of recording evidence of the witnesses of the plaintiffs by consent of parties.

11. On 11.7.2005, meeting was held but nobody was present on behalf of the defendants. Advocate for the plaintiff sought time to produce the papers and proceedings of the suit since the same were not made available with him. The next date of meeting, pursuant to the request made by the Advocate for the plaintiff was fixed on 16.7.2005. Advocate for the plaintiff was directed to inform the next date to the defendants and their advocate.

12. On the said date, i.e. 16.7.2005 meeting was held. Advocate for the plaintiff was present but the affiant who was to be cross-examined was absent. The meeting was then adjourned to 22.7.2005. On 22.7.2005, Advocate for the plaintiff again failed to produce the witness. The meeting was thus adjourned to 2.8.2005. Thereafter meeting was adjourned to 6.8.2005 due to unprecedented heavy rains suffered by Mumbai.

13. On 6.8.2005, Advocate for the plaintiff Shri K.N. Gaikwad along with Shri A.M. Pawar both were present; but nobody was present on behalf of the defendants. The witness who was to be cross-examined, was also absent because of his ill-health. Hence, meeting was again adjourned to 17.8.2005.

14. On 17.8.2005 again, the witness, who was to be cross-examined was absent. Therefore, proceedings were again adjourned and the advocate appearing for the plaintiff - Corporation was asked to get the period extended from the Court since the period fixed by the Court for recording evidence was to expire on 19.8.2005. The Commissioner was thereafter on 14.12.2005 informed by the plaintiffs' Advocate that period for submitting report by the Commissioner was extended by the Court by further 6 weeks from 8.12.2005 with a direction to record evidence of the witness at the residence of the witness. Pursuant to the communication again meeting was fixed on 14.1.2006.

15. On 14.1.2006 the plaintiff presented its witness Mr.J. N. Bhatkhande along with papers and proceedings of the suit. Since nobody had appeared on behalf of the defendants; meeting was adjourned to 15.1.2006, On 15.1.2006 again Corporation witness Bhatkhande was present, he offered himself for cross-exmination. However, since nobody had appeared for the defendants the cross-examination of the plaintiff's witness was required to be closed by the Commissioner. Thereafter ,the minutes of the meeting were circulated by the Commissioner to the parties concerned by hand delivery and also by

courier. The said minutes sent by courier to defendant Nos. 5 to 7 were returned back with the postal remark "shifted". The minutes sent to the defendant No.8 were returned with postal remarks " Building under construction". He, ultimately, submitted his report along with documents tendered before him to this Court.

16. After receipt of the aforesaid report, the suit was taken up for final hearing. Accordingly, learned Counsel appeared for the plaintiff-Corporation; whereas nobody was present on behalf of the defendants.

17. At this stage, learned Counsel for the plaintiff-Corporation sought time to enable him to produce documents. Adjournment was refused by this Court, considering the report made by the Commissioner, which has brought on record in unequivocal terms that almost on more than 6/7 occasions the plaintiff was granted time to produce original documents but Corporation failed to produce original documents.

18 This suit has been instituted by the Corporation in the year 1978 This suit reached for final hearing after about 28 years. Considering the age of the suit, this Court did not think it fit to

grant adjournment and called upon the plaintiff to make its submissions. Since adjournment was refused, he did not advance any submissions on merits of the suit and left the matter at the discretion of the Court for decision in accordance with law.

Consideration:

19. Having gone through the entire proceeding and taking into account documents placed on record, I am constrained to observe that not a single original document is placed on record by the plaintiff in support of its claim.

20. The plaintiff in suit for damages is required to state specifically the relief or remedy which the plaintiff claims. While framing the suit for damages, the basic distinction must be made between general damages or special damages or damages. General loss consists of all items of loss which the plaintiff is not required to specify in its pleadings in order to permit proof and recovery in respect of them at the trial. Special damage consists in all items of loss which must be specified before they may be proved and recovery granted. The basic test whether damage is general or special is whether particularity is necessary and

useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim which he will be confronted with at the trial. Keeping this in mind, if one turns to particulars of claims, set out in the plaint, no particulars of special damages are to be found therein. Therefore, plaintiff can only claim general damages suffered by the plaintiff.

21. Needless to mention that the burden of proving both the fact and the amount of damage is on the plaintiff before plaintiff can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon the person who denies it, so that where allegation forms an essential part of a person's case the proof of such allegation falls on him. Even if defendants fail to deny the allegations of damages or suffers default, the plaintiff must still prove his loss. It is thus for plaintiff to prove their case. To justify award of damages plaintiff must prove its claim before the Court. If the fact of damage is shown but no evidence is given as to its amount, then it virtually becomes impossible to assess the damages in trial; the suit must fail.

22. Having said so, let me consider evidence

produced by the plaintiff. Plaintiff has filed affidavit of one Mr. J.N. Bhatkhankar, working as Sr. Inspector of Licence of the plaintiff, who claims to be conversant with the facts of the case. He stated on oath and filed affidavit on the basis of record available with the Corporation. Therefore, it is clear that whatever has been stated on oath by him is on the basis of the record maintained by the plaintiff-Corproration. The statements made by Mr. Bhakhankar in the affidavit of evidence are not from his personal knowledge. Oral evidence cannot be substitute for documentary evidence. It was, therefore, expected on the part of the plaintiff to produce admissible documentary evidence to establish the loss suffered by the Corporation. Not a single original document is produced by the plaintiff on which reliance can be placed. The documents on which reliance is sought to be placed includes photostat copies of the typed documents which do not bear any signature or seal of the author of the documents.

23. These documents are not signed by any of officers of the Corporation. These documents are not certified to be true copies. None of them were initialled by any responsible officer of the Corporation. None of these documents are carbon copies of original documents. Photostat copies of

the typed documents do not prove authenticity or authorship of the documents. Needless to mention that photostat copies of typed unsigned documents are not admissible in evidence. In this view of the matter, there is absolutely no legal evidence produced on behalf of the plaintiff to prove any single fact alleged in the plaint. In this view of the matter, considering evidence of the plaintiff, none of the issues relating to loss caused to the Corporation can be answered in favour of the plaintiff-Corportion. Hence all issues i.e. Issue Nos. 1 to 7 of which burden lay on the plaintiff -Corporation are answered in negative.

24. Thus, plaintiff- Corpopration failed to prove any of the issues.

25. Defendants did not lead any evidence. They were absent when the suit was taken up for hearing. Hence the Defendants failed to prove issues Nos. 10 to 13.

26. In the circumstances, suit cannot succeed. The suit is thus, liable to be dismissed for want of evidence.

ORDER

Suit is dismissed with no order as to costs.

Decree be drawn accordingly.

(V.C.DAGA,J.)